

# Labor and Employment Issues Facing the Health Care Industry Today

Mark E. Tabakman, Esq.

973-994-7554

[mtabakman@foxrothschild.com](mailto:mtabakman@foxrothschild.com)

November 2, 2016

Wage & Hour blog: <http://wagehourlaw.foxrothschild.com>

Twitter: [@njwagelaw](https://twitter.com/njwagelaw)

A close-up photograph of a healthcare professional, likely a doctor or nurse, wearing a white lab coat over blue scrubs. The person is holding a purple stethoscope in their right hand. On their left wrist, they wear a white digital watch and a ring on their ring finger. A pen is clipped to the lab coat pocket. The background is blurred, showing what appears to be a clinical setting.

# Health Care Legal Issues

# Licensed Practical Nurses (LPNs), Charge Nurses, Coordinators: Supervisors or Not?

## Who is a supervisor under the National Labor Relations Act?

### Primary indicia of supervisory status under 2(11)

- Status determined by individual's duties, not title or job classification
- Any person having authority in the interest of the employer to hire, fire, transfer, suspend, lay off, recall promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action.
  - Regardless of frequency of performance



# Licensed Practical Nurses (LPNs), Charge Nurses, Coordinators: Supervisors or Not?

## **Secondary Indicia of Supervisory Status**

- Used in borderline cases
- Secondary factors include whether the individual:
  - is considered by his fellow workers and by himself to be a supervisor;
  - attends management meetings;
  - receives higher wage rate than his fellow workers;
  - has substantially different benefits from subordinate employees



# Case Summaries

**GGNSC Springfield LLC v. N.L.R.B.**, 721 F.3d 403 (6th Cir. 2013). The court held that Registered Nurses (RNs) employed by nursing home had the authority to discipline certified nursing assistants (CNAs), and thus were supervisors under the NLRA, even though the RNs could not impose immediate adverse employment consequences, where RNs exercised independent judgment in deciding whether to issue a written memorandum, provide verbal counseling, or do nothing in response to misconduct by CNAs, the decisions of the RNs were not subject to approval or consultation, and the written memoranda formed the basis for nursing home's progressive discipline policy.

# Case Summaries

**Schnurmacher Nursing Home v. N.L.R.B.**, 214 F.3d 260, 263 (2d Cir. 2000). The Second Circuit court held that the Registered Nurses and LPNs acting as Charge Nurses (“CN”) in a nursing home:

- Exercised power “responsibly to direct” Certified Nursing Assistants, exercised independent judgment in doing so, and thus were supervisors under the NLRA.
- Some tasks assigned to CNs include providing patient care, including the administration of medicine and medical treatment, bathing and dressing patients, etc. CNs prepare the daily assignment sheet, including any substitutions for absent CNAs, set forth breaks and room assignments and monitor overall patient care. CNs also direct CNAs and can be written up for failure to do so.

The Court reasoned that all these tasks, in the aggregate, amount to having the “power to direct” and were supervisory in nature.

# Case Summaries

**Lakeland Health Care Associates, LLC v. N.L.R.B.**, 696 F.3d 1332 (11th Cir. 2012). The court held that the record did not support the NLRB's determination that the LPNs employed by nursing and long term care facilities were not "supervisors" within the meaning of the NLRA. LPNs at Lakeland were able to discipline, suspend, and effectively recommend termination of the CNAs. This included a "coaching" program which was a two-step program where LPNs attempt to re-train or re-coach CNAs whose job performance may be lacking. Through this program, they had discretion to effectively suspend and/or terminate CNAs. LPN Charge Nurses also assigned and responsibly directed the work of the CNAs.



# Case Summaries

**Jochims v. N.L.R.B.**, 480 F.3d 1161 (U.S. App. D.C. 2007)  
held:

- RNs writing up of CNAs who violated work rules did not constitute disciplining of other employees as to constitute “supervisory” status.
- RNs orally reporting to facility management personnel that two employees were unfit for work did not confer “supervisor” status upon them.
- RNs permitting two employees to leave work early for children’s medical emergencies did not show supervisory authority.
- RNs partially filling out 90-day performance evaluation, by request of the Director of Nursing, did not indicate “supervisory” authority.



# Case Summaries

**Frenchtown Acquisition Company, INC. v. NLRB.**, 683 F.3d 298 (6th Cir. 2012) held RNs acting as Charge Nurses were not supervisors when:

- Verbal warning issued by CN to an aide was an *ultra vires* act and did not support finding of supervisory status.
- General, conclusory testimony that in-service trainings provided by Charge Nurses led to discipline, and were first step in disciplinary process, was not sufficient to satisfy employer's burden of proving that Charge Nurses had supervisory responsibilities.
- Evidence simply showing that CNs could bring CAN errors or misconduct to manager's attention, and that manager decided how to proceed, was not enough to find supervisory status.

# Case Summaries

## **Frenchtown Acquisition Company, INC. v. NLRB (Cont'd)**

- Evidence showing that manager made decision to discipline, and that CN merely brought performance issues to manager's attention, was not enough to find supervisory status
- Sending employees home for egregious misconduct did not require independent judgment, and thus did not prove supervisory status
- Charge Nurses involvement in hiring process that was limited to interviewing candidates when managers were too busy, which occurred only a few times, did not prove supervisory status.
- Assigning work through cooperative process was not exercising of supervisory powers.
- Giving assignments based on management's instructions did not show requisite independent judgment, and thus did not prove supervisory status.

# Independent Contractors

## Who is the Worker?

### *Employee vs. Independent Contractor:*

The New Jersey Supreme Court in Hargrove v. Sleepy's, LLC, 220 N.J. 289 (2015), resolved the issue of when an individual is an independent contractor under New Jersey law. Under this test (the same as the DOL test), an individual is presumed to be an employee unless the employer can show:

- The individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
- The service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- The individual is customarily engaged in an independently established trade, occupation, profession, or business

# Independent Contractors

## Federal:

- In June 2015, the U.S. Department of Labor issued an Administrator's Interpretation ("AI") to clarify its stance on who is and is not an independent contractor under the FLSA.
- The AI does not announce a new test, but stresses that under the "economic realities" test, *most workers* should be classified as employees.
- This "economic realities" test includes six factors — none of which are determinative, that courts are to construe liberally in favor of classifying individuals as employees:
  1. Is the work performed an integral part of the employer's business: if integral, then indicative of an employee.
  2. Does the worker's managerial skill affect the worker's opportunity for profit or loss: if a worker exercises managerial skill that affects her profit and loss, then indicative of an independent contractor.

# Independent Contractors

3. How does the worker's relative investment compare to the employer's investment: if the worker's investment is relatively minor (e.g., supplies), that suggests that the worker and the employer are not on similar footings and that the worker may be economically dependent on her employer – and thus an employee.
4. Does the work performed require special skill and initiative: a worker's business skills, judgment, and initiative, not her technical skills, will aid in determining whether the worker is economically independent.
5. Is the relationship permanent or indefinite: permanence or indefiniteness are indicative of an employee as compared to an independent contractor, who typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer.
6. What is the nature and degree of the employer's control: an independent contractor must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting her own business.

# Independent Contractors

## Common Mistakes and Repercussions of Misclassification

- Poorly drafted independent contractor agreements can lead to an adverse finding, but even a perfectly drafted agreement won't guarantee a finding of non-employee status.
  - The existence of a contract does not establish independent contractor status.
- Paying the Piper: Failure to properly classify employees can result in discrimination lawsuits, wrongful discharge suits, overtime claims, workers' compensation claims, unemployment claims, benefit claims, ERISA claims, union organizational activities.
- The silver lining: the advantages of employee status include:
  - control over work and conduct;
  - in the event of injury, workers' compensation claim rather than tort suit; and
  - continuity and loyalty: tie in through benefit plans

# Independent Contractors

## Who is the employer and how many are there?

- Distinguish between single employer and joint employer
- Single Employer Issues - Two or more enterprises may constitute a single employer, triggering coverage of a statute that would not apply to either enterprise individually.
  - FMLA: staffing firm or subcontractor may provide employees who, in conjunction with principal employer's workers, exceed 50-employee threshold
  - WARN: staffing firm or subcontractor may provide employees who, in conjunction with principal employer's workers, exceed 100-employee (excluding part-timers) threshold
  - COBRA: the extent of obligation to provide continued medical coverage
  - FLSA: adding up hours for overtime
  - OWBPA: extent of notice obligation as to release
  - ERISA: control group liability determination
  - Executive Order 11246: affirmative action plan obligation

# Independent Contractors

## Joint Employer Issues

- Staffing firm/customer context, companies are often joint employers
- Joint employers co-determine terms and condition of employment
- Potential areas of joint or secondary liability
  - Civil Rights Laws
    - Courts stretching the term employer to ensure that unconventional arrangements do not deny workers civil rights protections.
    - Courts can hold non-employers accountable where they control access to employment and deny it on the basis of proscribed criteria, e.g., testing company.
    - EEOC policy guidance on contingent workers.
    - The staffing company and customer may adjust liability by contract to place responsibilities on party exercising control.



# Recent “Joint Employment” Decisions/Interpretations

**FLSA:** In January of 2016 U.S. Department of Labor issued an AI announcing new standards for determining joint employment under the FLSA.

- The major takeaway from this Interpretation is that the DOL has broadly construed when an employer qualifies as a joint employer and, thus, when the employer may be held liable for wage and hour violations committed by the other joint employer.

Example: Casey, a registered nurse, works at Springfield Nursing Home for 25 hours in one week and at Riverside Nursing Home for 25 hours during that same week. If Springfield and Riverside are joint employers, Casey’s hours for the week are added together, and the employers are jointly and severally liable for paying Casey for 40 hours at her regular rate and for 10 hours at the overtime rate. Casey should receive 10 hours of overtime compensation in total (not 10 hours from each employer).

# Recent “Joint Employment” Decisions/Interpretations

**NLRA:** The NLRB issued a decision in Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015), overruling longstanding precedent to expand its interpretation of the circumstances in which businesses qualify as joint employers.

- Specifically, the Board considered “indirect control” to be the primary factor in determining whether a joint employer relationship existed under the NLRA.

Implications: The NLRB’s fact-sensitive approach in Browning-Ferris has made it very difficult to provide clients with general advice on this issue. Thus, the only major takeaway from this decision is that for an employer to avoid joint employer status—the employer must take a more hands-off approach than ever before to employees of other entities.

# Recent “Joint Employment” Decisions/Interpretations

**Title VII:** In Faush v. Tuesday Morning Inc., 808 F.3d 208 (3d Cir. 2015), the Third Circuit held that a temporary worker, employed by a staffing agency, could proceed with a discrimination claim against the business to which he was assigned to work. The court applied the far less expansive “right to control” test to determine joint employment status.

This test considers the following factors: the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

# Personal Liability for Health Care Supervisors/Managers

## Identifying the statutes that may allow for individual liability

### 1. Individual Managers/Supervisors May Not Be Individually Liable Under Title VII, the ADA, or the ADEA

- Supervisors (agents of the employer) do not have individual liability under Title VII, the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA) as they are not within the meaning of “employer.”
- Courts, including the Third Circuit, routinely use the case law under all three statutes interchangeably.
- The definition of employer under Title VII, the ADA and the ADEA are sufficiently similar to indicate Congress did not intend to allow for personal liability under these statutes.

# Personal Liability for Health Care Supervisors/Managers

In **Stallone v. Camden County Technical Schools Board of Education**, 2013 WL 5178728 (D.N.J. Sept. 13, 2013), a plaintiff brought a Title VII claim against her former supervisor, alleging he caused a hostile work environment. The court held that “Third Circuit jurisprudence is clear that Title VII does not subject individual supervisory employees to liability.”

In **Acevedo v. Monsignor Donovan High School**, 420 F. Supp. 2d 337 (D.N.J. 2006) a teacher set forth a prima facie case of age discrimination against school under the Age Discrimination in Employment Act (ADEA), but the Court held that the principal was not subject to individual liability under ADEA.

# Personal Liability for Health Care Supervisors/Managers

**Identifying the statutes that may allow for individual liability**

## **2. Individual Liability May Be Imposed Under the FLSA, FMLA, and Various Other Federal Statutes**

- The Fair Labor Standards Act (FLSA), the Equal Pay Act, the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Employee Retirement Income Security Act (ERISA), the Occupational Health and Safety Act (OSHA), the Conscientious Employee Protection Act (CEPA) and the Family and Medical Leave Act (FMLA)
- Focusing again on the term “employer” as defined under the FMLA, FLSA, and CEPA, individual supervisors may be individually liable for violations
  - Employer is defined as, “any person [or group of persons] who act(s), directly or indirectly, in the interest of an employer to any of the employees of such employer.”

# Personal Liability for Health Care Supervisors/Managers

- In **Haybarger v. Lawrence County Adult Probation & Parole**, 667 F.3d 408 (3d Cir. 2012), a “former state employee brought action against parole division for which she worked, county, and her supervisor, alleging violations of Family and Medical Leave Act (FMLA).” The court, as a matter of first impression, determined that the FMLA permits claims against supervisors in their individual capacity.
- In **Hayduk v. City of Johnstown**, 580 F.Supp.2d 429 (W.D. Pa. 2008), a former city employee sued the City and the City manager, individually and in his official capacity, asserting claims for alleged violations of the FMLA. While the court ultimately found the employee’s ankle injury was not a serious health condition under the FMLA, the court did find the City Manager could be sued in his individual capacity under the FMLA.

# Personal Liability for Health Care Supervisors/Managers

- DOL regulations provide that a supervisor can be individually liable for violations of the Family and Medical Leave Act
- Test for liability is whether the individual defendant had the ability to control, in whole or in part, the actions resulting in a statutory violation. Aguas v State, 220 N.J. 494 (2015).
  - In determining an individual's level of control, courts will often invoke the “economic reality” test
  - The economic reality factors are as follows: (1) the individual's power to hire and fire employees; (2) whether the individual supervised and controlled employee work schedules or conditions of employment; (3) if the individual determined the rate and method of payment of the employee; (4) if the individual maintained employment records; and (5) if the individual had personal responsibility for making decisions that contributed to the alleged violation



# Personal Liability for Health Care Supervisors/Managers

The following general standards also implicate individual liability

- If the supervisor has responsibility for compliance;
- If the supervisor has some degree of control over the employee;
- If the supervisor has the responsibility to address the employee with regard to issues arising under the FMLA/FLSA/CEPA; and,
- If the supervisor is the person charged with making the decision to take adverse action against the employee.

# Personal Liability for Health Care Supervisors/Managers

## **Aiding or Abetting in Discrimination or Otherwise Providing Substantial Assistance May Impose Individual Liability Under the NJ Law Against Discrimination.**

- Supervisors/managers can be individually liable under the NJLAD for ‘aiding and abetting’ discriminatory conduct of the employer.
  - To aid and abet in the discrimination the individual supervisor/manager must “willfully and knowingly associate himself/herself with the unlawful act, and seek to help make the act succeed.”

# Personal Liability for Health Care Supervisors/Managers

In **Barroso v. Lidestri Foods INC.**, 937 F. Supp. 2d 620 (D.N.J. 2013), a male employee sued his employer “alleging sexual harassment and retaliation in violation of NJLAD.” The plaintiff was subjected to lewd comments and inappropriate sexual gestures by a co-worker. The plaintiff made a formal complaint and the co-worker was fired. The plaintiff claimed retaliation because the shift manager who replaced the fired co-worker reportedly made negative statements to other employees about the plaintiff and prevented the plaintiff from doing his job effectively.

The Court held that employee's manager did not qualify as “supervisor” under NJLAD for purposes of holding the employer vicariously liable for manager's conduct, as the employer published an effective anti-sexual harassment policy and gave training on it. Thus, there was a safe harbor from vicarious liability and there was no evidence that the manager who allegedly engaged in the adverse employment actions against the employee was aware of his internal harassment complaint.

# Personal Liability for Health Care Supervisors/Managers

- Failure to act may also give rise to liability, if such failure rises to the level of substantial assistance or encouragement. *Failla v. City of Passaic*, 146 F.3d 149, 158 (3d Cir. 1998).
- “Substantial assistance” will depend on the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the harasser, his state of mind, and the duration of the assistance provided. *Marino v. Westfield Board of Education*, 2016 WL 2901706 (D.N.J. May 18, 2016).

# Personal Liability for Health Care Supervisors/Managers

Supervisors/managers may also be liable under the NJ Law Against Discrimination by virtue of a hostile work environment sexual harassment claim

- To state a claim of hostile work environment sexual harassment, the plaintiff must establish: “the complained of conduct (1) would not have occurred but for the employee’s gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. *Aguas v State*, 220 N.J. 494 (2015).
- An employer is generally liable for a hostile work environment created by a supervisor because of the power that an employer delegates to a supervisor to control the day-to-day working environment facilitates the harassing conduct. *Cowher v. Carson & Roberts*, 425 N.J. Super. 285 (App. Div. 2012).

# Personal Liability for Health Care Supervisors/Managers

- Where an employer delegates authority to a supervisor to control the situation of which the plaintiff complained and the supervisor's exercise of that authority results in a violation of NJLAD, and the delegated authority aided the supervisor in injuring the plaintiff, both the employer and supervisor can be held individually liable under the NJLAD.

# Hot Button Issues



# Social Media

## Use of Social Media at work and why it matters

### Growth of Social Media



**Facebook:** More than 1.5 billion users



**Twitter:** More than 320 million users



**Linkedin:** More than 400 million users



*Instagram*

**Instagram:** More than 400 million users



# Social Media



## What's the problem?

- 89% of employees admit to wasting time at work by visiting social media and other non-work related websites **every day** at work.
- What is keeping employees most off-task?:
  - Google: 24%
  - Facebook: 23%
  - LinkedIn: 14%
  - Other (Yahoo, Amazon, YouTube, ESPN, Pinterest, Twitter and Cragislist): 13%

Source: Salary.com's 2014 annual Wasting Time at Work Survey of more than 750 working Americans.

# Social Media

## **What are companies doing to control usage of social networking sites?**

- While social media usage by companies is increasing, employees' access to social media sites at work is decreasing.
  - 36% of employers block social media at work, up from 29% in 2012.
  - The amount of employers allowing workers to access all social media sites fell by 10% in one year, from 53 to 43%.

Source: Proskauer's 2014 annual global survey about social media use in the workplace

# Social Media

## How Are Companies Monitoring Employees On Social Networking Sites?

- 42% of employers actively monitor employees' use of social media sites at work, up from 36% in 2012.
- 59% of employers do not actively monitor employees' use of social media sites at work, down from 64% in 2012.



# Social Media: Hazards/Liability Issues From Employee Activities

- Employee Usage of Social Networking Sites:  
Business Risks
- Harm to corporate image/reputation
- Disclosure of confidential information and/or trade secrets
  - *Cubicle photos*
  - *Customer lists on LinkedIn*
- Harm to third-parties

# Social Media: Hazards/Liability Issues From Employee Activities

- Employee Posts: Suits Against Employer and Employee
- Employers who block access to a particular social networking site at work may be avoiding liability in some instances.
- Tort Claims:
  - Defamation of the Company, other employees, customers, etc.
  - Harassment/discrimination claims
  - Negligence
  - Infliction of emotional distress
- Privacy Torts:
  - Invasion of privacy
  - False Light Publicity
  - Public Disclosure Of Private Facts



# Using Social Media in the Hiring Process

- Employers who use social media in the hiring process must be aware of the associated dangers. Employers may be opening up the doors to discrimination claims if social media competence plays a part in hiring decisions or the employer secures information on an employee's account that cannot be unseen.
- On the one hand - the initial hiring process is fairly blind and companies can collect a mass of resumes/applications without knowing too much information about the applicants.
  - Therefore, any early decisions made cannot be discriminatory as there is no knowledge of whether or not an applicant is in a protected class.
- But on the other - Exposure to significant amounts of personal information about the candidates may lead the company to find out the race, national origin, sexual orientation and possible disability of an applicant.
  - For example, what if employer looks up an applicant on Facebook and:
    - Discovers he recently had cancer;
    - Has a same-sex spouse; and
    - Is Asian.

# Using Social Media in the Hiring Process



Then, if the applicant is denied employment and sues the employer because he believes the employer was discriminatory in the application process, the employer loses the defense that these factors did not enter into the hiring decision.

# Social Media

- Practical Tips:
  - Employers must also review state legislation. Several states have enacted statutes that limit the interception and monitoring of social media.
  - Several states, including California, prohibit employers from requiring or requesting employees or applicants to disclose their usernames or passwords to their social media accounts.
  - **Takeaway:**
    - Be consistent
    - Make job offers conditional: check after offer made



# Social Media

- Some companies use social media platforms and campaigns as part of everyday work and need employees to be social media savvy. Is this a problem?
- YES!
  - Social media savvy could be interpreted as discriminatory against people who either have not had access to social media or do not have the resources to use social media and become familiar with it.
    - A selection tool that eliminates older, presumably less tech-savvy workers?
    - Could impact poorer workers without access to expensive media platforms.

# Social Media

## The Solution:

- Do not require job candidates be up-to-speed on social media, but rather require they are willing to learn how to operate social media platforms upon hire.
- Employers should offer training to employees who are required to use social media as part of their job functions.



# Firing Employees for Social Media Posts



In past cases, the courts have found that a violation of a social media policy constituted a legitimate, nondiscriminatory reason for firing an employee.

Although now...

# Firing Employees for Social Media Posts

- There are several recent decisions by the NLRB that hold an employer liable under the National Labor Relations Act for terminating an employee related to social media if the actions are related to protected concerted activity under the NLRA.
- The NLRB has made a point of protecting employees who discuss their working conditions, complaints and terms of their employment with other employees through social media.

# Firing Employees for Social Media Posts

Drafting a Social Media Policy –  
Policy Considerations: the NLRA

- This is an issue for unionized and non-unionized employers.
  - **Policies often**
    - Prohibit Employees from disparaging the company, its competitors or its employees
    - Provide that violations can lead to disciplinary action
  - **Caution:** Must be exercised because of employee's Section 7 rights under the NLRA

# Firing Employees for Social Media Posts

Section 7 protects the rights of non-unionized employees to discuss working conditions – it provides that employees shall have the right to:

- Self organize;
- Form, join or assist labor organizations;
- Bargain collectively;
- Engage in other concerted activities for collective bargaining or other mutual aid or protection; and
- Refrain from any or all of the above

# Case Studies: “Protected, Concerted, Activity?” or NO WAY!

## Example 1:

- An employee of a catering company posted the following on his social media account:
  - Bob is such a NASTY MOTHER F\$%#ER don't know how to talk to people!!!!!! F%&k his mother and his entire f#&king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!
- Based on this post, employee is terminated. Outcome?
- Protected! - the Board found this disgruntled employee's comments were “not so egregious as to exceed the Act's protection.”

# Case Studies: “Protected, Concerted, Activity?” or NO WAY!

## Example 2: (Design Technology Group, LLC et al)

- The following conversation took place on Facebook in response to a retail manager’s reprimand of Employee 1 for closing the store early:
  - [Employee 1]: needs a new job. I’m physically and mentally sickened.
  - [Employee 2]: It’s pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I’m am unbelievably stressed out and I can’t believe NO ONE is doing anything about it! The way she treats us in NOT okay but no one cares because every time we try to solve conflicts NOTHING GETS DONE!!
  - [Employee 1]: bettie page would roll over in her grave.
  - [Employee 2]: She already is girl!
  - [Employee 1]: 800 miles away yet she’s still continues our lives miserable. Phenomenal!
  - [Employee 2]: And no one’s doing anything about it! Big surprise!
  - [Employee 3]: “bettie page would roll over in her grave.” I’ve been thinking the same thing for quite some time.
  - [Employee 1]: hey dudes it’s totally cool, tomorrow I’m bringing a California Worker’s Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that’s going on that’s in violation see you tomorrow!
- All employees are later terminated. Protected or not?
  - Protected! - the Board found that the employees comments were protected and that their termination violated the Act because the employer failed to prove she would have made the same decision in the absence of this Facebook exchange.



# Case Studies: “Protected, Concerted, Activity?” or NO WAY!

## **Example 3:** (Three D, LLC [Triple Play])

- Former employee posted the following on her Facebook account after she realized she owed taxes:
  - “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!”
- Two current employees responded. One “Liked” the comment via Facebook and was fired. The other made a comment about the same thing happening to her and was also fired. Outcome?
  - Protected! –
    - The Board found that Section 7 of the Act protected the underlying Facebook discussion because the discussion related to terms of employment and was intended for employees’ mutual aid and benefit.
    - The Board also found that the Facebook conversation was in order to prepare for group action by discussing the issues the employees intended to raise at a staff meeting and/or to government authorities.
- On Appeal to the Second Circuit:
  - Second Circuit upheld the NLRB’s decision using an “arbitrary and capricious” standard of review
    - The comments and subsequent “like” were part of an “ongoing labor dispute” and not directed at the products or services offered by the employer. Even though the post contained some obscenities, it was not so “disloyal” as to lose the protection of the Act and the decision was upheld.
  - Second Circuit refused to make the decision precedential.

# Case Studies: “Protected, Concerted, Activity?” or NO WAY!

## **Example 4:** Richmond District Neighborhood Center

- Two seasonal employees posted the following in anticipation of returning to the summer program:
  - “Let’s do some cool s—, and let them figure out the money”
  - “field trips all the time to wherever the f— we want!”
  - “play music loud”
  - “teach the kids how to graffiti up the walls ...”)
  - “they start lossn kids i ain’t helpn”
  - “Let’s f— it up”).

Employer (Teen Center) rescinded their offers to two employees to return to the summer program. Outcome?

Not Protected! - the Board held: “The magnitude and detail of the insubordinate acts advocated in the posts reasonably gave the [Employer] cause for concern that [the employees] would act on their plans, a risk a reasonable employer would refuse to take. The [Employer] was not obliged to wait for the employees to follow through on the misconduct they advocated.”

# Case Studies: “Protected, Concerted, Activity?” or NO WAY!

What Policies Has the NLRB found Unlawful or Lawful?

- The Board found the these policies UNLAWFUL:
  - “[D]on’t pick fights” online.
  - “Do not make ‘insulting, embarrassing, hurtful or abusive comments about other company employees online,’ and ‘avoid the use of offensive, derogatory, or prejudicial comments.’”
  - “Show proper consideration for others’ privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.”
  - “Employees are not ‘authorized to speak to any representatives of the print and/or electronic media about company matters’ unless designated to do so by HR, and must refer all media inquiries to the company media hotline.”
- The Board found these policies LAWFUL:
  - “No harassment of employees, patients or facility visitors.”
  - “No unauthorized disclosure of ‘business secrets or other confidential information.’”

# Solutions

- Therefore, before making the decision to terminate an employee because of a social media post, employers need to ask:
  - Was the employee discussing issues with another employee that may be interpreted as protected concerted activity?
  - Was the employee criticizing a management policy or complaining about compensation or other terms and conditions of employment?
    - These types of postings are protected under the NLRA, regardless of whether a union is involved.

# Solutions

- Employers also may violate NLRB rules if social media policies are so broad they prevent employees from discussing their wages or other conditions of employment.
- Some states have laws that protect broad categories of off-duty conduct or require that employers demonstrate a connection between an employee's engagement in an activity and the employer's business.
  - Currently, there are (at least) 31 States that have some sort of off-duty conduct law, and social media posts or the information gleaned from them may be covered.

# Employees Posting Inappropriate Content on Company Platforms

1. Every employee has a right to work at a place free from harassment and discrimination.
2. Some states are helping employers by criminalizing behavior, like “blowing off steam.”
3. Some have made it a crime to use a fake name or identity to create a website or social media account, as well as made it illegal to attempt to intimidate or threaten any person through social media.

# Employees Posting Inappropriate Content on Company Platforms

4. Employers who friend or follow employees on social media may subject themselves to discrimination claims, as they may have access to an employee's medical history, religious affiliation or other information that would place an employee in a protected class that the employer would not have access to otherwise.
- If the employee is later terminated, he could claim it was because of information the employer had access to on social media.
  - Further, co-workers who friend one another may compromise workplace morale if they are exposed to one another's political views, religious views and other personal views and do not agree.

# Employees Posting Inappropriate Content on Company Platforms

## **Drafting an Effective and Enforceable Social Media Policy:**

- Include reasonable restrictions designed to:
  - prevent disclosure of confidential company information and trade secrets,
  - prevent legal claims against employee and employer,
  - reinforce the organization's other policies/codes of conduct,
  - control productivity, and
  - protect the image of company
- Policy Considerations:
  - Consent to monitoring
  - Specifically define “electronic communications” and company equipment
  - Use of private email at work
  - Password protected email and/or documents
  - Cooperation with Investigations



# Employees Posting Inappropriate Content on Company Platforms

- Policy Drafting Checklist
  - Tell employees what content is prohibited
  - Spell out consequences for violation of policy
- Failing to Preserve Evidence
  - As part of the policy, employers should also make sure to clarify that any posting on company social media is the property of the company along with the accounts, usernames and any other information associated with the accounts.
  - In this manner, when an employee leaves, the account information stays with the company.



# Americans with Disabilities Act

## What is a Disability?

- A disability must be of certain duration and must substantially limit major life activities in order for an employee to receive protection under the ADA.
- Short-term injuries with no permanent long-term impact are not disabilities.



# Americans with Disabilities Act

## **What is a substantially limiting condition?**

- An employee who experiences a mere decrease in his/her ability to perform a major life function, or who is unable to perform only certain minor tasks associated with a job, is not substantially limited within the meaning of the ADA.
- An employee who is precluded from performing only one job or only certain distinct tasks, rather than an entire class of jobs, is not substantially limited within the meaning of the ADA.

# Americans with Disabilities Act

- The mere fact that an individual suffers from a recognized ailment or disease does not necessarily mean that this individual is substantially limited in his/her ability to perform the major life function of work.
- Mitigating and corrective measures (such as medication and corrective eye wear) may be considered when determining whether an employee is disabled.

# Americans with Disabilities Act

## What is a reasonable accommodation?

- Determining what may be an accommodation is an interactive process
  - Employer must be made aware of the employee's disability before it is obligated to take any action
  - Employer not obligated to adopt the reasonable accommodation suggested by the employee, but it is "preferred."
- Reasonable accommodation may include, but not limited to:
  - removing non-essential functions;
  - purchasing equipment to help an employee perform his job;
  - transferring a disabled employee to a vacant position; or
  - depending on the type of job at issue, permitting a disabled employee to work at home.
- Reasonable accommodations do not include the following:
  - restructuring a company's entire organizational scheme
  - transferring a disabled employee to a department and a position so that he/she can avoid contact with other individuals where such action would adversely impact the work of other employees
  - eliminating a disabled employee's essential job functions.

# Americans with Disabilities Act

- Extended leave time may be a reasonable accommodation.
  - An employer is not obligated to permit a disabled employee to take indefinite periods of leave time
  - An employer is not obligated to excuse a disabled employee's repeated and sporadic attendance problems
  - Consideration must be given to a Leave of Absence following a leave under the Family Medical Leave Act. **After that FMLA leave expires, accommodation obligation (possibly) begins.**
- Employer may lawfully exclude an individual from employment for safety reasons if the employer can show employment of the individual would pose a direct threat to the health and safety of others.

# Americans with Disabilities Act

## **Mental Disability**

- An employer must be aware that an employee suffers from a mental disability before it is obligated to act
- Not all mental impairments will substantially limit an employee's major life activities
- Certain mental disabilities render an employee unable to perform the essential functions of a job



# Americans with Disabilities Act

## Alcoholism and Drug Use

- The employer must have knowledge of employee's alcoholism in order for the ADA to apply.
- An employer can terminate employees for violating a company no-alcohol policy as long as the company's rules are applied consistently, e.g. reporting to work under the influence.
- An alcoholic who presents a direct threat of danger to himself and/or others will not be protected by the ADA
- A ***single*** leave of absence for treatment is usually a reasonable accommodation for an alcoholic employee.
- Employees with continuing or recent drug use are not protected by the ADA
  - The ADA, however, protects former drug users who are presently drug-free and have been without drugs for a considerable period of time.
- Employers may not require the disclosure of an employee's prescription drug use when such inquiries are not job-related and not consistent with a business necessity



# Recent Cases

- In **Stadtmiller v. UPMC Health Plan, Inc.**, 491 F. App'x 334 (3d Cir. 2012), an Army veteran suffering from Traumatic Brain Injury and PTSD sued his former employer under the ADA following his termination. The Court found that “UPMC made a good faith effort to engage in the interactive process in accommodating Stadtmiller's disabilities.” Ultimately, the court dismissed the case because “UPMC met with [Stadtmiller] to discuss what accommodations he might need, quickly responded to his requests, ensured that his requests had been fulfilled, and detailed what he needed to do to improve his performance to meet the standard of his department.”

# Recent Cases

- In **Samper v. Providence St. Vincent Medical Center**, 675 F.3d 1233 (9<sup>th</sup> Cir. 2012), a neo-natal intensive care unit (NICU) nurse was not entitled to reasonable accommodation under ADA that would have exempted her from essential function of regular attendance. Although the written policy of the hospital had allowed for some unplanned absences and nurse's absences had exceeded those permitted under policy in past years without repercussions, unplanned absences were a hardship to NICU, the policy represented outer limit to the number of unplanned absences that could be tolerated without serious repercussions to patient care, and the nurse never met attendance policy requirements despite efforts of the hospital to accommodate her.

# Recent Cases

- In **Jakubowski v. Christ Hospital, Inc.**, 627 F.3d 195 (6th Cir. 2010) a former medical resident at hospital, who suffered from Asperger's Disorder, brought an action against the hospital alleging he was terminated because of this condition and that hospital failed to reasonably accommodate this disability. The hospital had terminated the plaintiff because it concluded that his lack of ability to deal with patients was one that was essential to the job of being a doctor. The Hospital tried to accommodate him by finding him another position where his patient contact would be less. The court held that the “resident's proposed accommodation was not a reasonable one under the ADA, and hospital participated in the interactive accommodation process under the ADA in good faith.”

# Recent Cases

- In **McMillian v. City of New York**, 711 F.3d 120 (2d Cir. 2013) a city employee, who had schizophrenia, sued, based on disability in violation of the Americans with Disabilities Act (ADA). Due to the side effects of medication for his illness the plaintiff arrived late to work on a daily basis. The employer had a policy of flex-time and required that the employees work 35 hours per week. Because of this flex-time policy, the court reversed the lower court's dismissal of the case and held that further proceedings were needed to determine whether or not allowing the employee to arrive later than the stated "flex-time" hour would be unreasonable. The employee had no issue staying at work the required number of hours, he simply could not arrive by the start time in the morning.

# Americans with Disabilities Act

## **Perceived Disabilities**

- Employer's awareness of an employee's condition does not equal perception that the employee is disabled.
- An employer may perceive an employee as disabled if the employer knows about the employee's illness and encourages treatment or counseling.
- The employee's condition must be perceived as substantially limiting.

# Americans with Disabilities Act

## **Preemployment Inquiries under the ADA/Medical Examinations**

- An employer may not conduct medical exams of applicants until after it makes a conditional job offer to the applicant.
- An employer can request medical exams of employees if such actions are done pursuant to a business necessity and the information regarding the employee is job-related.
- All inquiries, no matter the form must be job related and consistent with business necessity.

# Americans with Disabilities Act

## Recommendations

- Consider the possibilities. Accommodation may not be more onerous than you might think.
- Communicate and train management on ADA responsibilities.



# Americans with Disabilities Act

## Supreme Court Case

- In Raytheon Company v. Hernandez, 540 U.S. 44 (2003) a former employee brought an action against his employer, alleging that the employer refused to rehire him due to his record of past drug addiction or his perceived drug addiction disability, in violation of the Americans with Disabilities Act (ADA). The United States Supreme Court held that:
  - (1) the employer's unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules was a legitimate, non-disability based reason, under the ADA, for employer's refusal to hire employee who had left his position after testing positive for cocaine; and,
  - (2) once the employer presented a neutral explanation for its decision not to rehire the employee, the only relevant question in an ADA action alleging disparate treatment was whether there was sufficient evidence to conclude that the employer made its decision based on employee's status as disabled, despite the employer's proffered explanation, e.g. a pretext.



# Americans with Disabilities Act

## ADA-FMLA/Light Duty Cases

- In **Grant v. Revera Inc./Revera Health Sys.**, No. CIV.A. 12-5857 JBS, 2014 WL 7341198 (D.N.J. Dec. 23, 2014), an employee working as a physical therapist suffered from a shoulder sprain while at work, which limited her ability to lift objects and the use of her right arm. The employee took the position she could “hardly perform any tasks” and “declined, on her own volition, to perform any tasks that required the use of her right arm.” Ultimately, the employee was terminated and she later sued her employer under the ADA. The court found that because her employer provided her with a schedule “that enabled her to work only with those lower-need patients,” absent a doctor’s note affirming her alleged total inability to use her arm, that her employer had provided a valid reasonable accommodation.
- In **Artis v. Palos Community Hosp.**, No. 02-C-8855, 2004 WL 2125414 (N.D. Ill. Sept. 22, 2004), a certified nursing assistant who took a temporary limited-duty assignment for several months while recovering from a wrist injury, and then was unable to secure a new nursing position once she was cleared by her doctor to return to nursing, failed to show she was fired in violation of the FMLA because she was given more than 12 weeks of job protection.

# Americans with Disabilities Act

## ADA-FMLA/Light Duty Cases

- In **Daugherty v. Genesis Health Ventures Of Salisbury, Inc.**, 316 F. Supp. 2d 262 (D. Md. 2004), the court held that the employer's failure to provide light duty assignments to pregnant workers did not violate the Pregnancy Discrimination Act, where the employer had a longstanding policy of withholding light duty assignments for all employees who had work restrictions not resulting from on-the-job-injuries.
- In **Etheridge v. Fedchoice Federal Credit Union**, 789 F. Supp. 2d 27 (D.D.C. 2011), a former employee brought an action against her former employer, alleging discrimination and wrongful termination in violation of Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA). The court held that the employee's plantar fasciitis did not qualify as disability under ADA, although the employee's medical impairment was of central importance to her daily life activities of standing and walking. It was temporary in nature, in that it lasted eight months at most, and it did not severely impact her ability to stand or walk.

# New Jersey Overtime Issue

- A New Jersey statute prohibits health care facilities from requiring certain employees to work overtime. See 34:11-56a31. The law makes it a violation for a health care entity to require hourly wage employees who are involved in direct patient care activities or clinical services to accept work in excess of an agreed to, predetermined and regularly scheduled daily work shift, not to exceed 40 hours per week, except in the case of an unforeseeable emergent circumstance when the overtime is required only as a last resort and is not used to fill vacancies resorting from chronic short staffing.

# The Family and Medical Leave Act of 1993

## Eligibility

- An employee of a covered employer. The FMLA defines "employer" as a person who "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."
- Employed for at least twelve months.
- Worked at least 1,250 hours during the last twelve months immediately preceding the commencement of a leave.
- Hours spent by employee engaged in her principal work activities are considered to be hours worked under the FLSA, by contrast, periods during which employee is completely relieved from duty and which are long enough to enable her to use the time effectively for own purposes are not hours worked under the FLSA.

# The Family and Medical Leave Act of 1993

## **Entitlement**

Leave may be taken:

- Upon the birth, adoption or foster care placement of a child with the same employee;
- To care for the serious health condition of the employee's spouse parent, minor, or disabled child; or
- For the employee's own serious health condition.
- Twelve weeks of unpaid leave in a twelve-month period.

# The Family and Medical Leave Act of 1993

- When planning leave, employees should consult with the employer and make a reasonable effort to schedule leave so as not to unduly disrupt the employer's operations.
- Serious health conditions include any condition involving in-patient care, incapacity of more than three days with continuing medical treatment, incapacity of any duration for pregnancy or prenatal care, a chronic condition, conditions which cannot be effectively treated or multiple treatments.
  - A period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity relating to the same condition that also involved treatment two or more times by a health care provider or treatment on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.
  - A chronic condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time and may cause episodic rather than a continuing period of incapacity.

# The Family and Medical Leave Act of 1993

## **Intermittent or Reduced Leave**

- When leave is taken because of the birth, adoption, or foster care placement of a child, an employee is allowed to take intermittent or reduced leave only if the employer agrees.
- When leave is taken to care for a sick family member or for an employee's own serious health condition, leave may be taken intermittently or on a reduced schedule when necessary.
- Employee on an intermittent or reduced basis may be required to transfer temporarily to an available alternative position with equivalent pay and benefits, and which better accommodates the leave.
- While there is no limit on the size of an increment of leave taken on either of these basis, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences.

# The Family and Medical Leave Act of 1993

## **Use of Accrued Paid Time Off**

- The employer may (and should) mandate that all accrued paid time off such as vacation, personal leave or sick time be used during all or part of FMLA leave.

## **Continuation of Health Benefits**

- An employer must maintain the employee's group health coverage. Coverage must be provided under the same conditions as coverage which would have been provided if the employee had not taken FMLA leave.
- Employee must continue to pay any share of premiums while on leave.
- An employee on leave is subject and entitled to any changes in the group health benefits during the leave.



# The Family and Medical Leave Act of 1993

## Notice Requirements

- Employees are required to give 30 days notice to employers of FMLA leave when such leave is foreseeable. When such leave is not foreseeable, an employee must give notice as soon as practicable.
- An employer may require that leave for the employee's own serious health condition or the serious health condition of employee's family member be supported by a certification issued by a health care provider.

## Employee Rights Upon Return from Leave

- Employee is entitled to be returned to the same or an equivalent position with equivalent benefits, pay and other terms and conditions of employment. **Note: Do not “play games” with this!**
- Employee has no greater rights to reinstatement than if the employee has been continuously employed during the leave period, e.g., a reduction in force.
- State law sometimes permits leave for reasons other than the federal standard.
  - For example, New Jersey includes parent-in-law in the definition of parent. Federal and state leaves also do not always run concurrently. Example: Employee takes federal FMLA for pregnancy complications and then state FMLA to care for child

# The Family and Medical Leave Act of 1993

## Recent Cases

In **Hansler v. Lehigh Valley Hosp. Network**, 798 F.3d 149 (3d Cir. 2015), an employee who, in support of her request for intermittent leave under the Family and Medical Leave Act (FMLA), submitted a medical certification form requesting leave for two days a week for approximately one month was fired for 'absenteeism' a month later, after she had taken several days off work, but before she was notified that her request had been denied and without her former employer seeking any clarification about the medical certification. The Court found that because the employer failed to warn the employee that her certification was inadequate or to give her a chance to correct it, it violated the FMLA.

# The Family and Medical Leave Act of 1993

## Recent Cases

In **Duncan v. Chester Cty. Hosp.**, 2016 WL 1237795 (E.D. Pa. Mar. 29, 2016), an employee requested FMLA leave for an operation he would be having in April of 2013. His request was granted. However, on March 26, 2013, he was terminated due to alleged ongoing behavior problems. Ultimately, the court found that the employee failed to establish “a prima facie case of retaliation in violation of the FMLA on the basis of temporal proximity, intervening antagonism or retaliatory animus, inconsistent reasons for his termination, or the other evidence [employee] identified as proof of retaliation.”

# The Family and Medical Leave Act of 1993

## Other Relevant Cases

- A federal appeals court ruled that Attention Deficit Disorder (“ADD”) is not a serious health condition under the FMLA. Perry v. Jaguar of Troy, 353 F.3d 510 (6th Cir. 2003). However, a federal district court in New York refused to dismiss the FMLA claim of an employee who sought leave to care for her son with Attention Deficit Hyperactivity Disorder (“ADHD”). Jennings v. Parade Publications, 2003 WL 22241511 (S.D.N.Y. Sept. 30, 2003).
- Employer Cannot Reduce “Stay Bonus” Because of Leave
- Jessen Corp., d/b/a CIBA Vision, 222 F. Supp. 2d 1052 (N.D. Ill. 2002). An employer violated the FMLA when it reduced an employee’s “stay bonus” that was intended for workers who stayed “actively employed” while a new company took over the business – because she took FMLA leave after adopting a child. The Court noted that the stay bonus was analogous to a “perfect attendance” bonus described in a DOL regulation prohibiting employees’ disqualification from such a bonus because they took FMLA leave.

# The Family and Medical Leave Act of 1993

## **Other Relevant Cases:**

Employer May Prorate “Productivity” Bonuses for Employees Returning from Leave – Sommer v. The Vanguard Group, 461 F.3d 397 (3d Cir. 2006).

- A former employee filed a complaint against employer alleging interference claims under the FMLA when, upon his return from approximately eight weeks of short-term disability FMLA leave, it did not award him a full annual bonus payment, but instead awarded him a payment prorated on the basis of the time he was absent. Sommer argued that the prorating policy violated his FMLA rights because the company did not similarly prorate bonuses for those employees who take paid forms of leave, such as vacation or sick leave. Ultimately, the court held that the employer was free to prorate bonuses that reward production (e.g. bonuses tied to number of hours worked), but may not prorate those that reward “the absence of an occurrence” (e.g. bonuses given for avoiding accidents or having perfect attendance).

Firing for Dishonesty/Fraudulent Use of FMLA Leave – Connel v Hallmark Cards, Inc., 2002 WL 1461969 (D. Kan. 2002).

- Connel filed suit after being fired for attending a county fair when she claimed she was ill and took a FMLA leave. She was spotted by co-workers at the fair.

# Hiring and Firing

# Hiring Practices: Avoiding the Legal Pitfalls

## Overview of Legal Requirements in Hiring

- Anti-Discrimination Laws: Basic Discrimination Principles
  - Stereotypes Unlawful
  - Two Theories of Discrimination: Disparate Impact/Disparate Treatment
- Disparate Treatment
- Purposeful discrimination: Different treatment because of a protected characteristic.
  - Example: African-American applicant for sales job with 12 years experience rejected and White applicant with 3 years experience chosen.
- Disparate Impact
- Practice does not classify according to protected category but adversely affects the protected group.
  - Example: requirement that all computer repair technicians have a college degree (where other schooling provides adequate training) has a disparate impact on minority groups as more minorities will be rejected because disproportionately fewer minorities receive college degrees than non-minorities.

# Hiring Practices: Avoiding the Legal Pitfalls

## **Federal Anti-Discrimination Laws**

### **Title VII of the Civil Rights Act of 1964**

- Prohibits discrimination on the basis of race, color, national origin, religion, and sex as to compensation, terms, conditions or privileges of employment or classifications of applicants/employees based on such characteristics which would tend to deprive them of employment opportunities or otherwise adversely affect their status as employees.

### **Pregnancy Discrimination Act**

- Prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions.
- Requires women affected by pregnancy, childbirth or related medical conditions to be treated same for all employment related purposes as other persons not so affected but similar in ability/inability to work.



# Hiring Practices: Avoiding the Legal Pitfalls

## **Equal Pay Act**

- Requires employers to compensate female employees at rates equal to the rates at which male employees are compensated in the same establishment for equal work on jobs which require equal skill, effort and responsibility and which are performed under similar working conditions.

## **Age Discrimination in Employment Act**

- Prohibits discrimination in employment on the basis of age. Protected class of employees over age 40.

## **Americans with Disabilities Act**

- Prohibits discrimination in employment against "qualified individuals with disabilities", defined as: an individual who meets the skill, experience, education and other job related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of the job.

# Hiring Practices: Avoiding the Legal Pitfalls

## **New Jersey Law Against Discrimination**

- Prohibits discrimination against same protected classes as federal law, but adds:
  - marital status
  - sexual orientation
  - no minimum age for age discrimination
  - broader definition of "disability"

# Hiring Practices: Avoiding the Legal Pitfalls

## **Other Employment Laws**

### **National Labor Relations Act**

Prohibits discrimination on basis of union membership and concerted employee activity.

### **Family and Medical Leave Act**

Prohibits retaliation for exercising leave rights.

# Hiring Practices: Avoiding the Legal Pitfalls

## **Federal Fair Credit Reporting Act**

- Requires employers to disclose to applicants where they obtain an "investigative consumer report" from a "consumer reporting" agency regarding applicants' credit worthiness, credit standing, character, reputation, or personal characteristics. Notice must be provided to applicants within 3 days from the date that the report is actually requested. If the employer decides not to hire an applicant, and that decision is based at least in part on information contained in the report, the employer is required to disclose this fact to the applicant and to provide him/her with the name and address of the agency that prepared the report.
- Interaction with Title VII: Use of credit reports must be job-related and justified by business necessity as it will likely have a disparate impact on protected groups.

# Hiring Practices: Avoiding the Legal Pitfalls

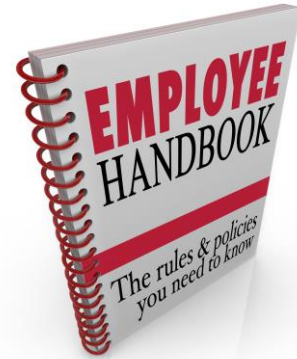
## Employment At-Will

- Absent an employment contract, employees may be fired or may quit at any time, for any reason not otherwise prohibited by law.  
Bernard v. IMI Systems, 131 N.J. 91 (1993).
- This doctrine has been **significantly** eroded away.

# Hiring Practices: Avoiding the Legal Pitfalls

## Common-Law Exceptions to Employment At-Will

- Employment Contract
- Individual Contracts
  - Specified Term (i.e. 2 years)
  - Sets out specific grounds for termination
  - Can be written or oral. Shebar v. Sanyo Business Systems Corporation, 111 N.J. 276 (1988) (oral representation made to individual employee)
- Detrimental Reliance
  - Where applicant reasonably relies on employer's representation, employer may be liable, i.e. where applicant moves across country and employer rescinds job offer
- Policies, Practices or Procedures
  - Employee Handbook may be enforceable as an employment contract.



# Hiring Practices: Avoiding the Legal Pitfalls

## Public Policy

- Prohibits termination for reasons that conflict with clear mandates of public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980).
- Prohibits Retaliatory termination/discipline for:
  - Refusal to engage in illegal conduct; and,
  - "Whistleblowing", i.e. reporting improper or illegal activities of supervisors to outside authorities (but internal complaints are not protected). **Note: NJ has Conscientious Employee Protection Act**
  - Applicant Privacy as Public Policy
- An employee was fired because she refused to take a drug test for her employer. The court held there is no public policy precluded termination of private employee for refusal to take a drug test. Slaughter v. John Elway Dodge Southwest/Autonation, 107 P.3d 1165 (Colo App. 2005).

# Achieving Employer Hiring Goals within Legal Restrictions

## Pre-Employment Inquiries

### General Principles

- All inquiries, no matter the form (i.e. application, interview, reference check, etc.), must be job related, consistent with business necessity, and least discriminatory alternative
- Avoid inquiries pertaining to, or that would likely elicit applicants' membership in, a protected classification
- Employers may inquire about certain classifications (other than race, color or national origin) where shown to be *bona fide* occupational qualifications, e.g. sex for an actress
- Employers may not ask "disability-related" questions, i.e. those inquiries that are "likely to elicit" information about a disability



# Achieving Employer Hiring Goals within Legal Restrictions

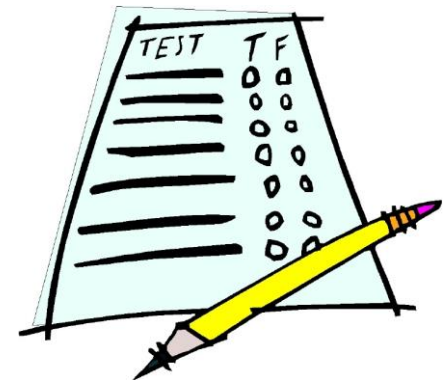
## **Pre-Employment Inquiries (Cont'd)**

- All permissible disability-related information must be kept confidential and maintained separately from employment files
- Information may be obtained for legitimate purposes after employee is hired, e.g. age or dependents for insurance benefits, post-offer medical examination
- Employer Responses to an applicant's disclosure of a protected trait or classification or disability: What to do?
- Avoid explicit discussion of protected classifications
- Focus on job-relatedness where discussion may lead to inference of protected classifications
  - For example, discussion about NAACP membership should focus on business-related experiences (i.e. public speaking, organization skills, etc.)

# Achieving Employer Hiring Goals within Legal Restrictions

## **Job Tests**

Uniform Guidelines on Employee Selection Procedures require all job tests which have a disparate impact on applicants from protected groups to be validated through complex statistical analyses.



# Hiring Within Legal Restrictions: The ADA

## Medical Examinations

Employers are prohibited from administering medical examinations to applicants until the applicant is given a "real" job offer, i.e., where the employer has evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer.

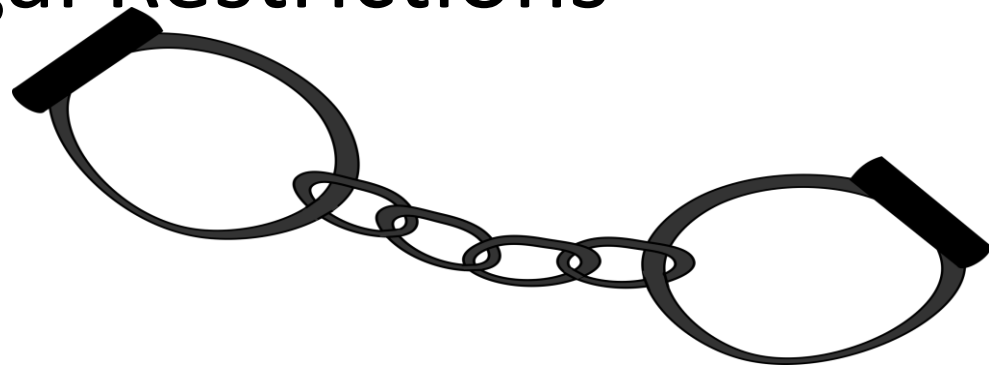
### Impermissible Exams:

- Any medical examination
- Psychological examinations that provide information that would lead to identifying a mental disorder or impairment
- Vision tests which involve health care professionals or use of diagnostic devices such as eye charts
- Tests for use of alcohol

### Permissible Exams

- Physical agility tests, in which the applicant is required to perform actual or simulated job-related tasks
- Physical fitness test, unless an applicant's physiological or biological responses are monitored
- Applicants may be required to provide medical certification that they can safely perform physical agility or fitness tests and certify that they will assume liability for injuries arising from such tests
- Tests for illegal drugs

# Achieving Employer Hiring Goals within Legal Restrictions



## **Arrest Records**

Ban the Box: Effective March 1, 2015. No inquiries on arrests and convictions until completion of first interview. Can refuse hire based on information received after the initial employment application process.

# Achieving Employer Hiring Goals within Legal Restrictions

## Conviction Records

Green v. Missouri Pacific R.R. Co., 523 F.2d 1790 (8th Cir. 1975).

Employers must individually assess each case involving a conviction record to determine whether the conviction would have an impact on the employee/applicant's ability to perform the job competently and safely.

- For example, an employer may exclude an individual recently convicted of narcotics distribution from a job in which there is unsupervised access to pharmaceuticals.
- Evaluate the following factors to determine if conviction record is appropriate selection basis:
  - the kind of conviction;
  - the seriousness of the offenses: The Manson Gang
  - the time lapse since a conviction; and
  - the nature of the work the individual will be doing.

# Achieving Employer Hiring Goals within Legal Restrictions

## Reference Checks

- Employers permitted to ask about names of persons willing to provide professional and/or character reference for applicant or for name and address of person to be notified in case of an accident or emergency
- Employers prohibited from eliciting information from references that would be impermissible to ask the applicant directly
  - Example: A request that the applicant's pastor or religious leader provide a recommendation would be impermissible because it elicits the applicant's religion

# General Steps in Disciplinary Decision Making

## Performance Discharges: The Process:

- Counsel employee-verbal.
  - ID deficiencies
  - Give steps to correct
  - Offer assistance
- Revisit and Document
  - 30-45 days out
  - Improvement? Same? Worse?
  - Document
  - If worse, this is written warning (i.e. discipline) and need to improve made well-known,
  - Warn of further consequences, up to and including, termination
- Follow up
- 30-45 days
- If performance unchanged, now a three-day suspension and final warning
- Eventual Termination
  - Or, they see the writing on the wall. The Launching Pad theory.

# Discharges: Different Kinds

## Disciplinary Discharges: The Process

### Step 1: Investigate the Facts:

- Speak to witnesses.
  - Take statements where appropriate
  - Resolve conflicting accounts
- Preserve and review physical evidence, e.g., doctor's notes, drugs, time card
  - Seal, date and identify evidence where appropriate
  - Take photographs where appropriate, e.g. damaged truck
  - Get the employee's account
  - Have two supervisors present
- Take notes
- Follow up on employee's claims
- Consider suspension pending investigation
- Is the employee's continued presence a security risk, a threat to managerial authority, or harmful to employee morale?
- Consider involving the police
  - Has a crime been committed?
  - Does the company want to prosecute because of the seriousness of the crime, as leverage to obtain return of funds, or as a deterrent to others?



# General Steps in Disciplinary Decision Making

## Step 2: Review Applicable Policies

- Documents
  - Employment contract
  - Letters of hire
  - Confidentiality and non-compete agreements
  - Employment handbook
  - Supervisory manual
  - Work rules
- Oral representations
- Are there specific rules governing this conduct?
- Are the rules clear?
- Did the employee receive the rules?
- Do the rules provide a penalty?
- Is there a range of penalties?



# General Steps in Disciplinary Decision Making

## **Step 3: Review Employee's Record**

- Prior warnings for the same offense?
- Prior warnings for other offenses?
- Has the employee responded well to prior warnings?
- The amount of time since last warning
- Annual evaluations and increases
- Seniority
- Work record
- Value to company
- Special compensating factors

# General Steps in Disciplinary Decision Making

## **Step 4: Review Past Practices**

- Has a similar incident ever occurred before?
- How has it been treated?
- If there has been inconsistent treatment or if you want to act differently than in the past, what is the justification for your action?

## **Step 5: Make a Fair Decision in Light of all the Circumstances**

- Did the company mislead this employee?
- Was his misconduct intentional?
- Did he have reason to be confused about what was expected of him?
- Does the decision you are recommending seem harsh?
- What will be the impact of this decision on other employees and supervision?

# General Steps in Disciplinary Decision Making

## **Step 6: Review Recommended Decision with Upper Management Prior to Implementation**

- Act only within your authorization
- Be prepared to review with your superior all pertinent facts as set forth above

## **Step 7: Consider Alternatives**

- Final warning in lieu of suspension
- LOA

# General Steps in Disciplinary Decision Making

## **Step 8: Review with Counsel Prior to Implementation in Cases Involving Potential Litigation**

- Civil rights laws
- Workmen's compensation statute
- Occupational Safety & Health Act
- National Labor Relations Act
- Whistle blower statute
- Polygraph statute
- Public policy
- Abusive discharge
- Unusual circumstances

# General Steps in Disciplinary Decision Making

## **Step 9: Communicate Decision to Employee**

- Consider use of a standard disciplinary form
- Be sure wording is accurate as to date, time, place and circumstances
- Make sure employee receives a copy, and that one is kept in the personnel file
- Confront employee with discipline and note his response
- Have the employee do most of the talking, not you
- Obtain admissions where feasible and have the employee sign
- Have the employee sign off on resignation or on any penalty short of discharge
- Make sure all company data is consistent, e.g., report to unemployment office
- Do not publicize incident or decision outside management group involved or those who have a "need to know"

# General Steps in Disciplinary Decision Making

## **Step 10: Preserve and Control Disciplinary File**

- Maintain complete file in the event of litigation
- Maintain confidentiality of all information in regard to discipline
  - Release of information in all discharge cases should be cleared through counsel
- Prospective employer inquiries
- Unemployment compensation inquiries
- Other



Mark E. Tabakman, Esq.

973.994.7554

[mtabakman@foxrothschild.com](mailto:mtabakman@foxrothschild.com)

**Wage & Hour blog:**

<http://wagehourlaw.foxrothschild.com>

**Twitter:** [@njwagelaw](https://twitter.com/njwagelaw)